MOTION FILED
MAR 11 1983

No. 82-1150

IN THE
Supreme Court of the United States

OCTOBER TERM, 1982

HOWARD ELLIS, *et al.*,

Petitioners,

v.

BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, *et al.*,

Respondents.

ALLEN L. FAILS, *et al.*,

Petitioners,

v.

BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, *et al.*,

Respondents.

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT ON BEHALF OF WILLIAM L. DICKINSON

WILLIAM J. OLSON*
JAMES E. GATES
SMILEY, OLSON & GILMAN
1815 H Street, N.W., Suite 600
Washington, D.C. 20006
(202) 466-5100

GUY O. FARLEY
12 Culpepper Street
Warrenton, Virginia 22186
(703) 347-4722

*Counsel of Record

March 11, 1983

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-1150

HOWARD ELLIS, *et al.*,

Petitioners,

v.

BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, *et al.*,

Respondents.

ALLEN L. FAILS, *et al.*,

Petitioners,

v.

BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, *et al.*,

Respondents.

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* ON BEHALF OF WILLIAM L. DICKINSON

The Honorable William L. Dickinson, Member of Congress, respectfully moves for leave to file the annexed

brief *amicus curiae*.* In support of this motion, Congressman Dickinson states as follows:

Congressman Dickinson represents the Second Congressional District of Alabama in the United States House of Representatives. He was first elected to this office in 1964 and has held it continuously since then. Congressman Dickinson serves as the ranking minority member of the Armed Services Committee. Prior to his service in Congress he served as a judge in the Alabama courts.

As a member of Congress, Congressman Dickinson has a responsibility to protect and promote the interests of the large number of working men and women in his jurisdiction and in the United States generally. His request for leave to file the annexed brief is in furtherance of this responsibility.

Congressman Dickinson believes that the positions he takes in this brief, particularly those relating to the constitutional significance of this case to the working men and women of America, will not otherwise be fully presented to the Court.

---

*Pursuant to Rule 36 of the Rules of this Court, counsel for William L. Dickinson requested the consent of counsel for the parties to the filing of a brief *amicus curiae* in this case. Counsel for Petitioners has consented to the filing of this brief, while counsel for Respondent has refused to consent to the filing of said brief, necessitating this motion. Counsel for Petitioners' and counsel for Respondents' letters have been filed with the Clerk of the Court.

Wherefore movant respectfully requests that his motion for leave to file the annexed brief *amicus curiae* be granted.

Respectfully submitted,

WILLIAM J. OLSON*
JAMES E. GATES
SMILEY, OLSON & GILMAN
1815 H Street, N.W., Suite 600
Washington, D.C. 20006
(202) 466-5100

*Counsel of Record

GUY O. FARLEY
12 Culpepper Street
Warrenton, Virginia 22186
(703) 347-4723

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF THE *AMICUS CURIAE*	1
REASONS FOR GRANTING THE WRIT	2
I. The *Ellis* Case Raises Critical Unresolved Issues Of National Importance Which Should Be Decided By This Court	2
II. The Ninth Circuit's Rebate Scheme Is Inadequate To Remedy A Serious Violation Of Constitutional Rights	12
CONCLUSION	15

TABLE OF AUTHORITIES

CASES: Page

Abood v. *Detroit Bd. of Education*, 431 U.S. 209 (1977) ..... 6, *passim*

Brotherhood of Ry. Clerks v. *Allen*, 373 U.S. 113 (1963) ..... 5, *passim*

Ellis v. *Brotherhood of Ry. Clerks*, 685 F.2d 1065 (9th Cir. 1982) ..... 2, *passim*

Elrod v. *Burns*, 427 U.S. 347 (1976) 10

Falk v. *State Bar*, 411 Mich. 63, 305 N.W.2d 201 (1981) 9

Galda v. *Bloustein*, 686 F.2d 159 (3rd Cir. 1982) 9, 14

Havas v. *Communications Workers of America*, 509 F.Supp. 144 (N.D.N.Y. 1981) 7

International Association of Machinists v. *Street*, 367 U.S. 740 (1961) ..... 3, *passim*

Railway Employes' Department v. *Hanson*, 351 U.S. 225 (1956) ..... 2, *passim*

Retail Clerks Local 1625 v. *Schermerhorn*, 373 U.S. 746 (1963) ..... 5, *passim*

Robinson v. *New Jersey*, 547 F. Supp. 1297 (D.N.J. 1982) 9, 14

School Committee v. *Greenfield Education Association*, 385 Mass. 70, 431 N.E.2d 180 (1982) 9, 14

Smith v. *Daily Mail Publishing Co.*, 443 U.S. 97 (1979) 13

Wooley v. *Maynard*, 430 U.S. 705 (1977) 10, 13

STATUTES:

National Labor Relations Act, 29 U.S.C. §§ 151, *et seq.* (1963) 5

Railway Labor Act, 45 U.S.C. §§ 152 *et seq.* (1983); 1951 Amendment, Pub. L. No. 82-914. § 2, Eleventh, 64 Stat. 1238 (1951) (codified at 45 U.S.C. § 152, subd. 11) ..... 3, *passim*

OTHER:

The Supreme Court, 1976 Term, 91 Harv. L. Rev. 70 (1977) 8, 11

U.S. Const. amend. I ..... 2, *passim*

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-1150

HOWARD ELLIS, *et al.*,

Petitioners,

v.

BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, *et al.*,

Respondents.

ALLEN L. FAILS, *et al.*,

Petitioners,

v.

BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, *et al.*,

Respondents.

BRIEF OF *AMICUS CURIAE* WILLIAM L. DICKINSON

This brief *amicus curiae* on behalf of William L. Dickinson is filed contingent upon the Court's granting the foregoing motion for leave to file a brief *amicus curiae*.

INTEREST OF THE *AMICUS CURIAE*

The interest of William L. Dickinson is set forth in his foregoing motion for leave to file a brief as *amicus curiae*.

REASONS FOR GRANTING THE WRIT

I. The *Ellis* Case Raises Critical Unresolved Issues Of National Importance Which Should Be Decided By This Court.

For twenty-seven years the United States Supreme Court has grappled with the distinction between permissible and impermissible uses by unions of agency fees paid by those working men and women who choose not to join unions but who are required to pay those fees under collective bargaining agreements permitted by federal law. A showing of an overriding governmental justification must be made before the state can compel an employee to give financial support to any group. This coercion impinges upon employees' First Amendment rights of free speech and association when that financial support is used to pay for union activities other than collective bargaining. It impinges most seriously on an employee's First Amendment rights when that employee's funds are used to support political candidates whom he opposes and advance an ideology with which he disagrees. Although some important steps have been taken by this Court to give recognition to these minority rights, the Ninth Circuit's decision in *Ellis* dangerously broadens the scope of the activities for which funding may be compelled. Additionally, the judicial remedies necessary to protect these constitutional rights remain underdeveloped and ineffective. A brief review of the five most important cases decided by this Court illustrates the need to establish standards and identify appropriate and effective remedies. The *Ellis* case should be the vehicle to accomplish those goals.

This series began with *Railway Employes' Department* v. *Hanson*, 351 U.S. 225 (1956). Nonunion railroad employees challenged the constitutionality of a 1951

amendment to the Railway Labor Act, Pub. L. No. 82-914, § 2, Eleventh, 64 Stat. 1238 (codified at 45 U.S.C. § 152, subd. 11). This amendment allowed unions and railroad companies to enter into agreements under which all employees were required, as a condition of employment, to pay certain dues to the union. Justice Douglas, writing for a unanimous Court, upheld the constitutionality of the amendment because an infringement of First Amendment rights of nonunion members was not presented by the record before the Court.

The payments were upheld on the theory that the nonmembers' ". . . financial support required relates . . . to the work of the union in the realm of collective bargaining." 351 U.S. at 235. Justice Douglas expressly acknowledged the First Amendment prohibition against using these funds for purposes other than collective bargaining. "If 'assessments' are in fact imposed for purposes not germane to collective bargaining, a different problem would be presented." 351 U.S. at 235. Justice Douglas expressed deep sensitivity to the potential First Amendment issues which could arise, stating that ". . . if the exaction of dues, initiation fees, or assessments is used as a cover for forcing ideological conformity or other action in contravention of the First Amendment, this judgment will not prejudice the decision in that case." 351 U.S. at 238.

The precise issue forseen by Justice Douglas in *Hanson* arose five years later in another Railway Labor Act case, *International Association of Machinists* v. *Street*, 367 U.S. 740 (1961). There, the employees alleged and the state court found that a substantial part of the compelled dues payments were used to finance the election campaigns of candidates for public office whom the employees opposed and to promote political and economic ideologies

with which the employees disagreed. This Court viewed the constitutional questions raised by the record to be ". . . of the utmost gravity." 367 U.S. at 749. Nevertheless, in order to avoid an unnecessary constitutional decision, this Court determined that the Congressional intent underlying the 1951 amendment prohibited the union from spending the dues of nonmembers for political causes which they opposed. The 1951 amendment was limited ". . . to force employees to share the costs of negotiating and administering collective agreements, and the costs of the adjustment and settlement of disputes." 367 U.S. at 764.

The holding limited the interpretation of the 1951 amendment to ". . . deny the unions, over an employee's objection, the power to use his exacted funds to support political causes which he opposes." 367 U.S. at 768-69. This Court expressed ". . . no view as to other union expenditures objected to by an employee and not made to meet the costs of negotiation and administration of collective agreements, or the adjustment and settlement of grievances and disputes." 367 U.S. at 769.

This Court's reason for barring the use of exacted funds for political expenditures was its implicit conviction that this would violate employees' First Amendment rights and its view that the reason for the 1951 amendment's requirement of dues payments by nonmembers was the need to defray the expenses of the ". . . negotiation or administration of collective agreements, or the expenses entailed in the adjustment of grievances and disputes." 367 U.S. at 768.

The state court in *Street* had enjoined the enforcement of the labor agreement because it had found a violation of constitutional rights. This Court found that remedy too broad and remanded the case for consideration of a proper

remedy. This Court suggested two possible remedies: an injunction against spending the funds of complaining employees for political causes, and the restitution of a proportional share of the dues. A prospective remedy was not otherwise addressed.

The type of remedy a court should fashion in these cases was again before this Court in another Railway Labor Act case, *Brotherhood of Ry. Clerks* v. *Allen*, 373 U.S. 113 (1963). This Court held that a protesting employee must manifest his opposition to union expenditures in order to be entitled to relief, but the burden of proof was not his. "It would be impracticable to require a dissenting employee to allege and prove each distinct union political expenditure to which he objects; it is enough that he manifests his opposition to *any* political expenditures by the union." 373 U.S. at 118 (emphasis original). Again this Court found the injunction fashioned by the state court inappropriate, and it presented certain suggestions for future decrees. The Court suggested to the state court that a refund be provided for the ". . . portion of the exacted funds in the same proportion that union political expenditures bear to total union expenditures, and . . . *a reduction of future such exactions from him by the same proportion.*" 373 U.S. at 122 (emphasis added). The Court also encouraged unions to adopt voluntarily a plan providing dissenters with relief. *Id.*

The next month, this Court decided *Retail Clerks Local 1625* v. *Schermerhorn*, 373 U.S. 746 (1963) under the National Labor Relations Act, 29 U.S.C. §§ 151, *et seq.* (1963). This Court recognized there is a distinction between collective bargaining and the institutional activities of a union. 373 U.S. at 752-54. It also noted that if nonmember funds are used to pay collective bargaining expenses, and member dues are used for institutional

expenses, the nonmember would pay a disproportionate share of collective bargaining costs and thereby subsidize the union's institutional activities. 373 U.S. at 754.

This matter was not before the Court in a major case again until *Abood* v. *Detroit Bd. of Education*, 431 U.S. 209 (1977). This case was different from *Hanson*, *Street*, *Allen* and *Schermerhorn* in that it involved a public employee union. A concurring minority opinion signed by three Justices indicated that they would have ruled that public sector employment was of a different nature than private sector employment and that ". . . compelling a government employee to give financial support to a union in the public sector—regardless of the uses to which the union puts the contribution—impinges seriously upon interests in free speech and association protected by the First Amendment." 431 U.S. at 255 (Powell, J., concurring). Accordingly, these Justices would ". . . require the State to come forward and demonstrate, as to each union expenditure for which it would exact support from minority employees, that the compelled contribution is necessary to serve overriding governmental objectives." 431 U.S. at 264.

This approach was not accepted by the Court, which believed that the private sector cases of *Hanson* and *Street* were applicable and that ". . . insofar as the service charge is used to finance expenditures by the Union for the purposes of collective bargaining, contract administration, and grievance adjustment, those two decisions of this Court appear to require validation of the agency-shop agreement before us." 431 U.S. at 225-26. This Court used the same standards established in the private sector to evaluate infringement of constitutional rights in the public sector. 431 U.S. at 230, 232. "The differences between public- and private-sector collective bargaining

simply do not translate into differences in First Amendment rights." 431 U.S. at 232. Accordingly, the *Abood* holding applies fully to a private sector case such as *Ellis*. *Havas* v. *Communications Workers of America*, 509 F. Supp. 144 (N.D.N.Y. 1981).

In *Abood* the state court ruled that the challenged state law sanctioned the use of nonunion members' fees for purposes other than collective bargaining, presenting constitutional issues not decided in *Hanson* or *Street*. 431 U.S. at 232. The Court held that the Constitution requires ". . . that such expenditures be financed from charges, dues, or assessments paid by employees who do not object to advancing those ideas and who are not coerced into doing so against their will by the threat of loss of governmental employment." 431 U.S. at 235-36.

Just as earlier Supreme Court decisions left certain issues undecided for later resolution, the *Abood* case anticipated that a case such as *Ellis*, with a fully developed record and comprehensive trial and appellate court opinions, would be presented to this Court. "There will, of course, be difficult problems in drawing lines between collective-bargaining activities, for which contributions may be compelled, and ideological activities unrelated to collective bargaining, for which such compulsion is prohibited." 431 U.S. at 236. Because the *Abood* case came to this Court after a judgment on the pleadings with no evidentiary record, without factual concreteness and adversary presentation to aid the Court, there was no occasion to delineate the distinction between permissible and impermissible uses of dissenters' fees and fashion an adequate remedy. 431 U.S. 236-37.

The *Ellis* case below arises under the Railway Labor Act and involves the determination of permissible and

impermissible uses of compelled funds. The Ninth Circuit cited a leading labor law casebook description of the issue as " '. . .the elusive problem left unresolved by the Supreme Court. . . .' " 685 F.2d at 1072. The Ninth Circuit relies on isolated, out of context, excerpts from this Court's holdings in *Hanson*, *Allen* and *Abood* to conclude that the relevant inquiry is ". . .whether a particular challenged expenditure is germane to the union's work in the realm of collective bargaining." *Id.* The Ninth Circuit proceeded to apply this novel test broadly, interpreting "germane," first used in this context in *Allen*, 373 U.S. at 122, to mean, simply, related.[1]

Judge Whelan's strong dissent points out the way in which the majority misinterpreted the word germane and ignored the distinction recognized in *Schermerhorn*. 685 F.2d at 1076 (Whelan, J., dissenting). A review of the five Supreme Court cases discussed *supra* leads to the inescapable conclusion that the range of expenses which can be funded with compulsory funds extends no further than the very rationale which allows the state to impose this restriction on First Amendment rights—the elimination of "free riders" through the compelled payment of expenses ". . . for the purposes of collective bargaining, contract administration, and grievance adjustment. . . ." *Abood*, 431 U.S. at 225-26. The Ninth Circuit disregarded the necessity of seeking the least restrictive intrusion into protected First Amendment interests of the individual employees. The reason for allowing an intrusion into protected First Amendment areas by compelling these

---

[1] One commentator pointed out that "[a]lmost any expenditure made by a union is connected in some way to its duties as collective bargaining representative." *The Supreme Court, 1976 Term*, 91 Harv. L. Rev. 70, 196 (1977).

payments is to meet those responsibilities conferred by the Railway Labor Act. In the area of non-collective bargaining institutional expenses, the reason for the intrusion is not applicable. As the reason for the rule fails, so should the rule. These expenditures certainly cannot be justified when weighed against the First Amendment interests of nonmembers.

The Ninth Circuit majority's excessive tolerance of intrusions into First Amendment rights would be remedied and prevented on a nationwide basis by a decision of this Court in *Ellis*. If this Court establishes clear rules of law, this will allow lower courts to consistently apply those rules and thereby safeguard First Amendment rights of nonunion members. If this Court denies *certiorari* in this case, the result will be continued judicial confusion such as that already apparent in the conflict between, on the one hand, the cavalier approach of the *Ellis* majority and, on the other, the more scrupulous concern for dissenters' rights shown by other courts in, for example, *Galda* v. *Bloustein*, 686 F.2d 159, 163-64 (3rd Cir. 1982); *Robinson* v. *New Jersey*, 547 F. Supp. 1297, 1316-17 (D.N.J. 1982); *School Committee* v. *Greenfield Education Association*, 385 Mass. 70, 431 N.E.2d 180 (1982); *Falk* v. *State Bar*, 411 Mich. 63, 105-12, 305 N.W.2d 201, 212-16 (1981) (opinion of Ryan, J.).

The *Ellis* case is a remarkable opportunity to draw the line between permissible and impermissible uses of agency fees. This case meets all of the standards set out in *Abood*, as it comes to this Court with a full evidentiary record. The factual issues were established after a trial to determine the nature of union expenditures. Able and effective counsel assisted the trial and appellate court in shaping the record. These circumstances present themselves together in one case in this area of the law only rarely.

The *Ellis* case commenced nearly ten years ago, well before the *Abood* decision, but the issues of that case were well anticipated. This Court in *Abood* viewed the constitutional issues as extremely serious based on the same constitutional principles which prohibit a state from compelling any individual to affirm his belief in God or to associate with a political party in order to retain public employment. 431 U.S. at 235. The *Ellis* case is the first opportunity which has come before this Court to attempt to finish the work begun twenty-seven years ago in guaranteeing that no working man or woman be coerced to relinquish his or her freedom of belief, be compelled to associate in violation of deeply held personal principles, or be stripped of his or her precious First Amendment rights.

The Ninth Circuit pursued an illogical path resulting in virtually all expenditures being funded with compulsory payments. That court read *Hanson*, *Allen*, and *Abood* as supporting a ". . .broader definition of the collective bargaining concept. . ." than that urged by the protesting employees. 685 F.2d at 1072. Every type of union operating expense under challenge had been found to be unrelated to collective bargaining by the trial court, but in all cases the Ninth Circuit reversed the finding below and found that the expenditures could be made with funds exacted from nonmembers. The court's logic was that the expenditures were germane to the administration of the union; the administrative structure of the union supported, *inter alia*, the union's collective bargaining responsibilities; and therefore the expenditures were germane to collective bargaining. This approach is inconsistent with the least restrictive alternative test which the court must employ when core First Amendment protections are invaded. *Elrod* v. *Burns*, 427 U.S. 347, 362 (1967); *Wooley* v. *Maynard*, 430 U.S. 705 (1977).

The approach of the *Ellis* dissent, however, is consistent with First Amendment standards. 685 F.2d at 1076. (Whelan, J., dissenting). To limit the use of nonmember fees to those activities *essential* to the union's role as collective bargaining representative would ". . . infringe the rights of employees to the slightest extent possible, and force dissenters to contribute only to those activities that directly benefit them—the provisions of a particular contract." *The Supreme Court, 1976 Term*, 91 Harv. L. Rev. 70, 198 (1977).

The issues raised by *Ellis* are of profound constitutional significance. Thomas Jefferson drafted the stricture: ". . . to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical."[2] It may be that "[s]ome forced associations are inevitable in an industrial society." *Street*, 367 U.S. at 775 (Douglas, J., concurring). The United States Congress has made certain accomodations to this reality in federal labor law, but has not sought to weaken First Amendment protections. The Congress enacted this one exception to a "firm legislative policy against compulsion" in the areas of railway unionization "as a specific response to the recognition of the expenses and burdens incurred by the unions in the administration of the complex scheme of the Railway Labor Act." *Street*,

---

[2] An Act for Establishing Religious Freedom passed in the Assembly of Virginia in 1786. Cited in *Abood*, 431 U.S. at 234 n. 31. Justice Black reminded us "[i]t should not be forgotten that many men have left their native lands, languished in prison, and even lost their lives, rather than give support to ideas they were conscientiously against." *Street*, 367 U.S. at 796 (Black, J., dissenting).

367 U.S. at 750-51. Justice Douglas expanded on the constitutional significance.

> Once an association with others is compelled by the facts of life, special safeguards are necessary lest the spirit of the First, Fourth and Fifth Amendments be lost and we all succumb to regimentation. . . . If an association is compelled, the individual should not be forced to surrender any matters of conscience, belief or expression. . . . [H]e should not be required to finance the promotion of causes with which he disagrees. [367 U.S. at 776 (Douglas, J., concurring).]

The exception to this Congressional policy against compulsion, the intrusion into protected First Amendment rights, must be viewed narrowly lest the exception engulf the rule.

II. The Ninth Circuit's Rebate Scheme Is Inadequate To Remedy A Serious Violation Of Constitutional Rights.

The Ninth Circuit undertook only a cursory inquiry into the propriety of the union's rebate scheme challenged below. The nonmembers alleged that the rebate program did not guarantee their First Amendment rights. The Ninth Circuit found this claim meritless. *Ellis*, 685 F.2d at 1069-71.

The rebate scheme approved by the Ninth Circuit is wholly inadequate to protect the rights of working men and women to be free from compulsory support of union activities other than collective bargaining. Under this scheme a worker is required to pay the full amount of annual dues, whether or not he disagrees with the political, ideological and other activities of the union other than collective bargaining. The union is free to expend the worker's funds on its political and ideological activities or other programs other than collective bargaining in its discretion. If a worker formally notifies the union of his objection to its political and ideological activities, it is

obligated to rebate to him during the succeeding year a portion of his dues equivalent to the amount the union spends on political and ideological activities in proportion to its total expenditures in the year in which the dues are paid. The union unilaterally decides what proportion of its activities are political and ideological. Workers who are dissatisfied with the amount of the rebate may challenge the determination before a review board whose members are selected by the union.

The dissenting workers are thus still required to support, until their dues are returned to them, views with which they disagree. During this period their First Amendment rights are violated just as surely as were the rights of the workers in *Abood*.

The right to free speech includes the right not to speak at all. *Wooley* v. *Maynard*, 430 U.S. at 714. The right to freedom of association and belief must therefore include the right to avoid associations that compel support of beliefs and ideals with which one disagrees.

A limitation on the exercise of freedom of speech is a prior restraint requiring ". . . the most exacting scrutiny . . ." by this Court. *Smith* v. *Daily Mail Publishing Co.*, 443 U.S. 97, 102 (1979). The compulsion inherent in the rebate scheme should be judged against no less strict a standard of review.

The eventual return of their dues does not undo the violation of the workers' rights. At best, it merely changes the character of their compulsory support of the union from an outright grant to an interest-free loan. As Justice Black concluded, to give a right to a rebate such as that set out in *Street* ". . . promises little hope for financial recompense to the individual workers whose First Amendment freedoms have been flagrantly violated."

397 U.S. at 796. Once damaged these rights are irreparably harmed. *Robinson* v. *New Jersey*, 547 F. Supp. at 1317-24; *School Committee* v. *Greenfield Education Association*, 385 Mass. at 78-85, 431 N.E.2d at 185-89; *see*, *Abood*, 431 U.S. at 244 (Stevens, J., concurring); *Galda* v. *Bloustein*, 686 F.2d at 167-69.

This Court has enunciated the principle many times that when the state seeks to limit rights under the First Amendment it must select the means which are least restrictive. The law should strive to protect these rights to the greatest extent possible and should not be parsimonious in the protective measures it adopts. *Street*, 397 U.S. at 797 (Black, J., dissenting). The Ninth Circuit has failed to adhere to this fundamental constitutional principle. There are alternatives to the rebate scheme used in this case which are much less intrusive into the rights of the workers to be free from compulsory support of union political and ideological activity. Reduction of dues prior to payment is a fairer means of protecting workers' rights. *Allen*, 373 U.S. at 122. This remedy does not require one who is constitutionally wronged to take the initiative to recoup his rights at the discretion of an organization that had deprived him of those rights. The Ninth Circuit's suggested cure is too tolerant of this constitutional deprivation.

There is no compelling interest on the part of the state or union which justifies the violation of workers' rights sanctioned by the rebate scheme. The state's interest in this area is no broader than reimbursement of the union for its services as the collective bargaining agent and likewise the union's only interest is support of its collective bargaining activities. Neither has a legitimate interest which would justify the collection of excessive agency fees, subject only to later rebate. Such a scheme

therefore impermissibly sacrifices the fundamental First Amendment rights of workers without an overriding governmental purpose.

CONCLUSION

The First Amendment rights which have been deemed so important by this Court were dealt with in cursory fashion by the Ninth Circuit. If this Court's holdings are not to be recast so as to weaken the protection they afford minority employees, this Court should grant *certiorari* to the Ninth Circuit and use the *Ellis* case to establish national criteria for the permissible uses of agency fees, as anticipated by *Abood*, which will protect fully the vital First Amendment rights of American working men and women.

Respectfully submitted,

WILLIAM J. OLSON*
JAMES E. GATES
SMILEY, OLSON & GILMAN
1815 H Street, N.W., Suite 600
Washington, D.C. 20006
(202) 466-5100

*Counsel of Record

GUY O. FARLEY
12 Culpepper Street
Warrenton, Virginia 22186
(703) 347-4723